No. 12,066

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors, by and through their guardian ad litem, Diamond Fotopulos,
Appellees.

REPLY BRIEF FOR APPELLANT.

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EVALUATION OF EVIDENCE.

(1) Where the evidence is in the form of depositions an Appellate Court is as capable of evaluating such evidence as a trial Court. As the Government driver was not available for trial except through his deposition, this Court may construe his testimony with the same force and effect as the trial Court.

Societe Suisse Pour Valeurs De Metaux v. Cummings, 99 F. (2d) 387, 391 (C.A. D.C.)

(2) Where there is not any substantial conflict in the evidence on the issue of negligence, and where the

facts point to but one inference, the lower Court is not free to adopt another inference. See

Wilmot v. Golden Gate Investment Co., 41 Cal. App. (2d) 664, 668, 107 P. (2d) 263;

Crawford v. Southern Pacific Railway, 3 Cal. App. (2d) 427, 45 P. (2d) 183.

In this connection it is the Government's contention that the evidence in the instant case conclusively points to the deceased's contributory negligence, and if guilty of the slightest contributory negligence, appellees cannot recover, as a matter of law. (See Appellant's Opening Brief, p. 9).

(3) Inferences are not species of fact or evidence, but deductions from facts. The findings of the trial Court were, we believe, based on inferences not supported by the facts. Perhaps a cogent example of inferences without being based on testimony or presumptions is the direct quotation of appellees in their brief on page 5, which apparently was relied upon by the appellees and the trial Court in sustaining the findings. The Court stated as follows:

> "A significant factor in the whole case, as I view it, is the stop signal, and this Court has driven that particular area many, many times. It is perfectly apparent to the Court * * * that the stop signal was perfectly visible at least a block away * * *"

First, we do not view the stop signal as being in any way the cause of the accident, and particularly significant in this case.

Secondly we doubt that the testimony supports this.

(a) Appellees' witness, Harry A Failor, was asked if the stop and go signal could be seen by a driver of an automobile as it approached Bush Street. The answer was—

> "A. It all depends as to whether there is a street car in line of vision or not.
>
> Q. If there is no street car in line of vision, can you see it?
>
> A. I am not positive but I believe you can."

It may also be noted that Failor did not know that the red light was on at the time (R.T. 79).

The testimony of the Government driver Bailey was as follows (R.T. 129):

> "Q. As you approached Bush Street, what was the condition of the stop sign?
>
> A. I did not notice the stop sign. I did not get that far before this other vehicle cut in front of me. At that time all I thought of was stopping, anyway."

Still further on he testified (R.T. 161) that the signal was visible for at least one-third of the block before reaching Bush Street.

We think that the Court will take judicial notice of the fact that these stop signals are constructed with a view that they will be seen at least forty feet from the intersection. The Court apparently assumed, without supporting facts, that Bailey should have seen the

stop signal at least a block away, and apparently it was significant in his decision.

NO SIGNAL BY FOTOPULOS.

Even if it is assumed that an inference can be taken from the testimony of appellees' witness (who did not see the accident) that Fotopulos stopped his truck while in front of the Government vehicle, yet the undisputed testimony shows that Fotopulos gave no signal at any time (R.T. 121). It is believed that under the circumstances of this case it would constitute contributory negligence and hence no recovery.

THE BURDEN OF PROOF IS ON APPELLEE.

Appellee

> "In order to recover, *must* be able to *prove* that the defendant *did some act* without which the collision would not have occurred * * * he must demonstrate that defendant was enabled to *foresee* or *know* of the danger of his conduct * * *" (Italics ours).
>
> (2 Cal. Jur. (10-Yr. Supp.) p. 460, citing previous authorities).
>
> *Mazgedian v. Swift & Co.,* 22 C.A. (2d) 570, 71 Pac. (2d) 833;

See:

> *Collins v. Hodgson,* 42 Pac. (2d) 700, 702.
>
> *Commercial Transfer, Inc. v. Daigh & Stewart,* 33 C.A. (2d) 370, 91 Pac. (2d) 951.

PHYSICAL FACTS.

It would appear that the physical facts, to-wit: that the only contact was the right front bumper of the Government vehicle against the left rear of Fotopulos' truck, could only be reasonably explained by Fotopulos cutting in. In considering this point, the only direct testimony is that Fotopulos did cut in front of the Government truck. The cutting in of Fotopulos' vehicle certainly would make such a contact, and if, as contended by appellees, the two trucks involved in the accident were directly parallel (Appellees' brief p. 8), the damage would be otherwise. It will be noted that appellees' own witness testified that no repairs were made to the fenders of Fotopulos' truck, yet the fenders extend beyond the body (R.T. 73); that the only damage caused by the blow was the tail gate (R.T. 75), which was on Fotopulos' left side. If the contact were directly behind, both fenders would have been dented.

The testimony of Failor that "I heard the Government driver say 'Well, my brakes didn't hold', or 'I couldn't help it' " (Appellees' brief p. 8) is vague, indefinite, and possibly an attempt to bolster the appellees' case. As he later states, on cross-examination, that he walked between cars parked at the curb to the place of the accident (R.T. 84) and that when Fotopulos came to his place of business to use the telephone, he was standing in the front doorway. It seems to us from all the evidence that this was an inaccurate statement at best. It was denied, of course (R.T. 135), and it further appears from the testimony that

the brakes were in A1 condition (R.T. 154). Failor further testified that Jud McNeil might have been with him, (R.T. 80), yet McNeil made no corroboration. It would appear that Failor and McNeil apparently did not go to the place of the accident (R.T. 155).

DEATH CAUSED BY INJURY.

In view of the very slight contact, the activity of Mr. Fotopulos after the accident, his lack of complaints, no immediate symptoms of injury (R.T. 59), and all the facts as a whole, it is believed that the contact was not such an exercise of a positive influence as to bring into existence the cause of his death.

Dr. Ryan, upon whom appellees rely to establish that Fotopulos' death was caused by the slight impact, took the hearsay statement of Fotopulos (R.T. 39) that he suffered a severe enough blow from the impact of the steering gear against his upper abdomen to base his diagnosis that it was the cause of his death. We think that the pathology shows that if there was any blow, it was in the lower quadrant and hence would not come from a blow against the steering gear.

Dr. Ryan testified that Fotopulos told him he suffered considerable pain at the time of the accident (R.T. 34) but the evidence is to the contrary. (R.T. 135; R.T. 180).

CONCLUSION.

There has not, it is believed, been shown any evidence that can be translated into negligence of the Government, but on the contrary, that Fotopulos was guilty of contributory negligence, and therefore the judgment should be reversed.

Gaston v. Hisashi Tsuruda (Cal. App.), 43 Pac. (2d) 355, 357.

Dated, San Francisco, California,
August 25, 1949.

Respectfully submitted,
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